now, and if they had anything to query in it they ought to have queried it before now.

I think, therefore, that we should receive this affidavit."

In *Bruen* v. *Bruce*[10] Hodson L.J., as he then was, said:

"I desire to say a word on another matter which has arisen in this case. There was no note of the learned judge's reasons for his decision and, as is common practice, counsel's note was written out and agreed with the other side. Unfortunately it was not submitted to the learned judge before the appeal came on for hearing, so that he had no opportunity of checking it. I desire to draw attention to the terms of R.S.C., Ord. 58, r. 18(15), which this court has previously done in *Hayman* v. *Rowlands*[1] (1957) 1 All E.R. 321). It is, I think, convenient, where there are only notes of evidence and no notes of the learned judge's judgment, except a very brief note, that counsel's note should be used only after it has been submitted to the learned judge."

Halsbury's Laws of England, 4th edition, volume 3, page 622 on the duty of barristers says:

"Counsel on each side should take a note of the substance of the... judgment for the information of the appeal court in the event of an appeal."

From the above, we would draw the following conclusions: while our rule 68 places on a *judge* who has given oral judgment the duty of "certifying in writing the grounds" of his judgment, nevertheless it is eminently desirable for counsel to take a note of the judgment, especially if his client is likely to appeal in case judgment goes against him. If his client is anxious to have the appeal disposed of early, counsel should refer the note first to counsel on the other side and then to the trial judge for his comment, if the note is agreed. It is desirable that this reference be made as soon as possible, otherwise he might forget. If the judge certifies the agreed note as a true record of the grounds of his judgment, it may be treated as the written certificate of his judgment within rule 68. If he does not, counsel's affidavit made available for our use should contain a note made by him of what was said by the learned judge when delivering judgment and the judge's comment thereon, and counsel for the other side should be free to make whatever comment he thinks fit during the course of argument on the merit.

If counsel for the other side does not agree with the note, the note and his comment on it should be referred to the trial judge for his comment; and the note and the comments of both counsel on the other side and the judge should be made available to help us.

If both counsel took a note of the judgment, it is desirable that they be shown each other's note. If they agree, the agreed note, and if they do not agree, the note taken by each counsel should be submitted to the judge for his comment. In either case the agreed note or the notes of each counsel and the judge's comment should be made available for our use.

The above notwithstanding, we would emphasize that the best aids that can be provided for our use are grounds written by the trial judge himself.

In the circumstances of this appeal, we would receive Mr. Peddie's affidavit, but first it should be shown to Mr. Palasuntharam who appeared on the other side at the trial to give him an opportunity to comment, and then it, together with his comment if any, be submitted to the learned judge for his comment. Mr. Peddie's affidavit containing his note, Mr. Palasuntharam's and the learned judge's comment, if any, should then be made available for our use.

We will fix a date for hearing arguments on the merits, after we have been informed that action has been completed in accordance with our direction.

Order accordingly.

Solicitors: *Skrine & Co.; Ranjit, Thomas & Kula.*

EU FINANCE BERHAD v. LIM YOKE FOO

[F.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Abdoolcader JJ.) March 25 & 31, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 2 of 1981]

Land Law — Order of sale made by Collector of Land Revenue — Error in order — Power of Collector to correct error or to postpone sale — No power to cancel order and issue a fresh order of sale — Second Order a nullity — National Land Code, ss. 33, 261, 262, 263, 264, 266, 417 & 418.

In this case the respondent had charged certain lands as security for a loan in favour of the appellant. The appellant took steps to enforce the charge in default of payment and the Collector of Land Revenue after enquiry made an order for the sale of the lands by public auction, specifying the amount due to the appellant at the date of the order as $443,694.52 and fixing the reserve price at $507,000. By an error only 12 instead of 20 titles were set out in the Schedule. The Collector acknowledged the error and confirmed that the first order covered all the 20 titles. The respondents filed a notice of appeal against the order and the Collector then purported to cancel the sale. The appeal was later withdrawn and the appellant requested the Collector to proceed with the sale. The then Collector of Land Revenue (who had succeeded the earlier Collector) purported to make and issue another order of sale, specifying the amount due to the appellant as the same as that stated in the first order but fixing the reserve price at a higher figure of $562,000 and scheduling all the 20 titles. Subsequently the Collector informed the appellant that he had cancelled the sale as the respondent had paid to him the sum specified in the order. The appellant protested and asked the Collector to fix a new date for sale. The respondent issued a writ claiming the release and delivery of the issue documents of title. The appellant counterclaimed for a declaration that the first order was still subsisting and claimed the sums due and outstanding including interest. The learned trial judge gave judgment for the respondent and dismissed the appellant's counter-claim. The appellant appealed.

Held: (1) as soon as the Collector made the first order under section 263 of the National Land Code he was *functus officio* save as to his power under section 264(3) to postpone the sale ordered or to formally rectify the first order within the purview of section 33 with no power to make another or subsequent order of sale under section 263;

(2) the second order on which the respondent relied was no order at all and was a nullity and devoid of any effect;

(3) the judgment of the trial judge must therefore be set aside and a declaration made that the first order was still subsisting and of full legal effect;

(4) the appellant was entitled to payment of his claim with accrued interest in satisfaction of his claim under the charge.

Cases referred to:-

(1) *Harkness* v. *Bell's Asbestos and Engineering Ltd.* [1967] 2 Q.B. 729, 736.

(2) *Birmingham (Churchwardens and Overseers)* v. *Shaw* (1849) 10 Q.B. 868, 880; 116 E.R. 329.

(3) *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, 34.

(4) *Ridge* v. *Baldwin* [1964] A.C. 40.
(5) *Director of Public Prosecutions* v. *Head* [1959] A.C. 83.
(6) *Regina* v. *Paddington Valuation Officer & Anor. Ex parte Peachey Property Corporation Ltd. (No. 2)* [1966] 1 Q.B. 380, 402.
(7) *Pow Hing & Anor.* v. *Registrar of Titles, Malacca* [1981] 1 M.L.J. 155, 157.
(8) *London & Clydeside Estates Ltd.* v. *Aberdeen District Council & Anor.* [1980] 1 W.L.R. 182, 189.
(9) *Land Executive Committee of Federal Territory* v. *Syarikat Harper Gilfillan Berhad* [1981] 1 M.L.J. 234.

FEDERAL COURT.

S.D.K. Peddie (*Zainuddin bin Haji Ismail* with him) for the appellant.

M.A. Krishnan for the respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The appeal before us involves only an issue as to the validity *vel non* of an order for the sale of land made by the Collector of Land Revenue, Kuantan on December 26, 1979 in Form 16H under section 263 of the National Land Code, 1965 ('the Code') after a similar order of sale after due enquiry under sections 261 and 262 of the Code had been made some three and a half years previously by another Collector on June 15, 1976. To avoid repetition, all references to statutory provisions in this judgment are in respect of the Code unless otherwise specifically indicated.

BACKGROUND OF PROCEEDINGS

The facts of the matter, in so far as material for the determination of the issue in question, are that the respondent as the registered owner of lands situate in Pahang and comprised in 20 titles executed a charge thereon as security for a loan of $350,000 in favour of the appellant which was duly registered on November 8, 1974. As a result of the requisite steps taken by the appellant to enforce the charge in default of payment, the Collector of Land Revenue, Kuantan ('the Collector') held an enquiry pursuant to the provisions of sections 261 and 262 which was concluded on May 29, 1976, and he then made an order dated June 15, 1976 under section 263 in Form 16H ('the first order') for the sale of the lands by public auction on August 5, 1976, specifying the amount due to the appellant at the date of the order was $443,694.52 and fixing the reserve price at $507,000, but by an error set out in the schedule thereto only 12 instead of 20 titles as he should have. The appellant complained of the omission on June 22, 1976 and asked for rectification of this *lapsus calami* by the Collector who by a letter dated June 30, 1976 acknowledged the error and confirmed that the first order covered all the 20 titles.

The respondent filed on June 18, 1976 a notice of appeal against the first order (later substituted as required by the rules of court by a motion by leave of the court) founded on the rate of interest exigible whereupon the Collector purported to cancel the sale but in effect only postponed it as will be seen when we discuss the position in law. The appeal was however withdrawn on June 8, 1978 and the appellant's solicitors then requested the Collector to proceed with the sale by a letter dated December 20, 1978 followed by a reminder on December 21, 1979 in which the Collector was notified that the amount outstanding on September 30, 1978 was $590,939.04 with interest chargeable thereafter at $175 per diem. The Collector, whose office had by now been assumed by an entirely different person from the one who had held the enquiry and made the first order, then made and issued another order of sale dated December 26, 1979 under section 263 in Form 16H ('the second order') in which he purported to order the sale of the lands in question by public auction on January 31, 1980, specifying the amount due to the appellant as the same as that stated in the first order, namely $443,694.52, but fixing the reserve price this time at a higher figure of $562,000 and scheduling all the 20 titles.

On January 28, 1980 the Collector informed the appellant's solicitors by telephone that he was cancelling the sale as the respondent had tendered to him under section 266 the amount stated in the second order and he confirmed this intimation by a letter on February 6, 1980 to the effect that the respondent had paid to him the sum specified in the second order under section 266(1) and (2)(a). The appellant protested that that amount was in fact the sum due at the date of the first order and that there was accordingly no effective or valid tender by the respondent for the purposes of section 266. The substantive dispute between the parties is in relation to the interest accruing between the date of the first order and the tender made by the respondent, as the appellant's contention, as its solicitors clearly indicated to the Collector in their letter of March 1, 1980, is that the amount due from the respondent as on February 25, 1980 was $683,956.44 with daily interest of $175 accruing thereafter until payment, apart from the legal fees incurred by the appellant in the sum of $6,526.80. As the respondent did not accede thereto the appellant's solicitors requested the Collector on May 3, 1980 to fix a new date for the sale.

The respondent had in the meantime however issued a writ on April 26, 1980 which was served on the appellant on May 2, 1980, claiming the release and delivery of the issue documents of title and the registered duplicate copies of the charge, an order for the execution by the appellant or the Senior Assistant Registrar of the court of a memorandum of discharge of the charge, and also damages. The appellant in turn counterclaimed for a declaration that the first order is still subsisting and of full legal effect with consequential prayers in respect of the sums claimed to be due and outstanding. The parties apparently agreed in the High Court that no evidence was necessary in these proceedings and that the suit should be determined only on written submissions of counsel. The learned judge accordingly proceeded on this basis and on December 10, 1980 delivered judgment for the respondent on his claim except, as it would appear from the formal order extracted, in respect of his claim for damages, and dismissed the appellant's counterclaim.

The appellant appeals against this decision but we are told from the Bar that on an application for a stay of execution pending the determination of the appeal, the parties had agreed and an order was made

accordingly to the effect that the charge would be discharged on payment of the amount not in dispute, and this has been done, but that the sum in dispute was to be lodged on fixed deposit in the name of the respondent's solicitors pending the result of the appeal. Counsel on both sides have therefore indicated that the only decision required of us in this matter is in regard to the validity of the second order and this would then only entail a consequential order for the disposal of the amount in dispute so lodged on fixed deposit.

VALIDITY OF THE SECOND ORDER

There is no power in the Collector to cancel an order made under section 263 or the sale to be effected thereby. When the Collector purported to cancel the first order on the respondent lodging an appeal against it, he was in effect postponing the sale, as he has only the power by virtue of the provisions of section 264(3) to postpone a sale ordered under section 263, and subject thereto an order of sale once made will have to be implemented in accordance with the provisions of section 265 unless it ceases to have effect under the provisions of section 266(1) upon tender by a chargor of the amounts specified in section 266(2).

The error in the first order in specifying only 12 instead of 20 titles was acknowledged and confirmed by the Collector by his letter on June 30, 1976 and he could have formally rectified this under section 33 which applies to the enquiry held before the first order was made by virtue of the provisions of section 261(2). Section 34 provides for the re-opening and section 35 for a rehearing of an enquiry in the circumstances stipulated therein which do not apply in this case, and section 36 specifically prohibits a second enquiry except as provided in section 34. As soon as the Collector made the first order under section 263, he was *functus officio* save as to his power under section 264(3) to postpone the sale ordered or to formally rectify the first order within the purview of section 33, with no power to make another or subsequent order of sale under section 263. The second order was made by a different Collector from the one who made the first order without holding any enquiry under sections 261 and 262 which is a prerequisite for an order under section 263(1). He had no power to make any such order as he purported to, and we would ingeminate the absence of any power even in the Collector who made the first order himself to make a second order under section 263. He has only the power within the provisions of section 33 to correct verbal errors or remedy some accidental defect or omission not affecting a material part of the enquiry.

It is contended on behalf of the respondent that the second order was made to rectify the omission of 8 titles covered by the charge in the schedule to the first order, and further that the first and second orders have a common mistake in that they should both have been dated May 29, 1976 when the enquiry was concluded and that the appellant should have taken steps to have the dates of the two orders rectified accordingly by way of an appeal under section 418. We find this argument wholly untenable. The Collector who made the first order had on June 30, 1976 acknowledged the error in the Form 16H incorporating that order and he could have issued a corrective order under section 33 or the matter could perhaps have been rectified by the court under section 417(1). It is inconceivable that the second order made some three and a half years later was ever intended as a corrective order to repair the omission of the 8 titles and in any event it was not a corrective but an entirely different one as it bears a new date for the sale, an enhanced reserve price and is dated when it was in fact issued a considerable time later, and made by another Collector in flagrant violation of the provisions of section 263 at that. We should perhaps add on the point made as to the date of the two orders that the first order was properly dated June 15, 1976 in the Form 16H in which it is set out in view of the provisions of section 263(2), and the second order, in so far as the date is concerned, was also appropriately dated December 26, 1979 when it was purportedly made, and by no stretch of reasoning or imagination would it be possible to say that the second order should bear the same date as the first.

In the circumstances it is abundantly clear that the second order on which the respondent relies is no order at all within and for the purposes of section 263 and is a nullity and devoid of any effect.

The respondent however argues that the second order in any event stands until and unless it has been set aside, and that the appellant's failure to appeal under section 418 to have it set aside is fatal and it is therefore not now open to the appellant to question its validity in these proceedings. The learned judge accepted this contention and in effect based his decision on this premise.

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness* v. *Bell's Asbestos and Engineering Ltd.*,[1] Lord Diplock L.J. (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' [*Birmingham (Churchwardens and Overseers)* v. *Shaw*[2] (at page 880 *per* Denman C.J.)]. In *Barnard* v. *National Dock Labour Board*[3] it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 *per* Singleton L.J.). *Ridge* v. *Baldwin*[4] is to the same effect.

Lord Denning said in *Director of Public Prosecutions* v. *Head*[5] (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina* v. *Paddington Valuation Officer & Anor., Ex parte Peachey Property Corporation Ltd. (No. 2)*[6] (at page 402). The judgment of this court in *Pow Hing & Anor.* v. *Registrar of Titles, Malacca*[7] refers (at page 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd.* v. *Aberdeen District Council & Anor.*[8] and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at page 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.

The decision of this court in *Land Executive Committee of Federal Territory* v. *Syarikat Harper Gilfillan Berhad*[9] to the effect that section 418 which provides for an appeal is the exclusive remedy of an aggrieved person or body against a decision *inter alia* of a Collector of Land Revenue and precludes any claim for declaratory relief, on which the respondent seeks to rely, has no application to the present proceedings as the decision sought to be impugned in that case was made within jurisdiction and was not a nullity. We reiterate the second order in the matter before us is invalid and wholly dehors the provisions of the Code and no appeal is therefore essential or necessary to impugn its validity and it can be subject to collateral attack in the instant proceedings.

THE RESULT

We accordingly for the reasons we have given allowed this appeal at the conclusion of argument, set aside the judgment of the learned judge, dismissed the respondent's claim and granted the appellant a declaration on the counterclaim that the first order is still subsisting and of full legal effect. We further made the necessary consequential order as a result, by agreement of counsel as we have earlier indicated, for the moneys lodged on fixed deposit in the name of the respondent's solicitors in satisfaction of the appellant's claim together with the accrued interest thereon to be paid out to the appellant in satisfaction of its claim under the charge and also ordered costs of this appeal and in the court below to the appellant in respect of the claim and counterclaim. The deposit lodged in court by way of security will be refunded to the appellant.

EPILOGUE

This case is yet another illustration of a bureaucratic botch by a misinformed land official in complete disregard of his functions and powers under the Code which has not only generated needless litigation, no doubt lucrative for the lawyers but certainly onerous and expensive for the parties, but also evoked an observation by the learned judge that the appellant should have made the Collector a party to these proceedings and be asked to pay it the disputed sum for further interest!

It is to be hoped, and it is expected, that it will not be necessary to repeat in the future the admonition administered in the peroration of the judgment of this court in *Pow Hing*[7] in perhaps even more trenchant terms or at all.

Appeal allowed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; James Foong & Co.*

CHI LIUNG HOLDINGS SDN. BHD. v. N.T.S. ARUMUGAM PILLAI

[O.C.J. (Arulanandom J.) September 5 & October 6, 1980; January 6 & February 3, 1981 and March 9, 1981]

[Penang — Civil Suit No. 295 of 1980]

Land Law — Specific Performance — Sale agreement — Application for transfer of Land.

Practice and Procedure — Specific Performance — When court will grant summary judgment — R.H.C. 1980, O. 81.

The plaintiff applied for an Order under Order 81 of the Rules of the High Court 1980 for specific performance by the defendant of a Sale Agreement dated March 10, 1978. The plaintiff sought for the transfer of the piece of land, Lot No. 2592 mentioned in the said Agreement to the plaintiff. The plaintiff had complied with the terms of the Agreement. He had paid the defendant a total of $400,000 to assist the defendant to clear his charge on the said land.

Under the said Agreement the defendant was obliged to execute a valid and registrable transfer and give possession of the said land to the purchasers.

The defendant claimed that it was a condition of the Agreement that the plaintiff give a friendly loan of $1,331,000 to the defendant. The defendant contended that the agreement was entered while he was under undue influence and that the executed Sale Agreement was different from the one the defendant had agreed to execute.

Held, allowing the plaintiff's claim: (1) it is only in a straightforward case where there is absolutely no defence can the court give summary judgment under Order 81 of the Rules of the High Court 1980;

(2) the plaintiff had performed as much of the contract as he could before the vendor transfer the said land. The defendant had accepted even the sum of $400,000 without protest and enjoyed the benefit of it. It would therefore be unconscionable to accept his defence as a *bona fide* defence and the case should go to trial. It was just a sham defence to help the defendant avoid having to perform his part of the contract.

Case referred to:-

(1) *Anglesey (Earl)* v. *Annesley* (1741) 1 Bro. Parl Cas. 289; 1 E.R. 573 H.L.

CIVIL SUIT.

A.R. Noor for the plaintiff.

Adam bin Mohamed Ibrahim for the defendant.

Arulanandom J.: This was an application by the plaintiff for an order under Order 81 of the Rules of the High Court 1980 for specific performance by the defendant of a Sale Agreement dated March 10, 1978 and that the defendant surrender his Title Deed described in Grant No. 2271 for Lot Nos. 2592 in Mukim II of Seberang Perai Selatan to the proper authorities for subdivision and transfer of the area of